

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 30, 2010

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC 105
Austin, Texas 78711-3087

Re: Splendora Ready Mix, Inc., Permit No. 91552
TCEQ Docket No. 2010-1711-AIR

Dear Ms. Castañuela:

Enclosed is a copy of the following documents which constitute the Executive Director's Response to Hearing Requests on the above-referenced matter:

- The Executive Director's Response to Hearing Requests
- A map indicating the proximate location of the hearing requestors

If you have any questions, please do not hesitate to call me at extension 0649.

Sincerely,

A handwritten signature in cursive script, appearing to read "Alexis Lorick".

Alexis Lorick
Staff Attorney
Environmental Law Division

Enclosures

TCEQ AIR QUALITY PERMIT NUMBER 91552
TCEQ DOCKET NUMBER 2010-1711-AIR

APPLICATION BY	§	BEFORE THE
	§	
SPLENDORA READY MIX, INC.	§	TEXAS COMMISSION ON
	§	
EUSTACE, HENDERSON COUNTY	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

The Executive Director of the Texas Commission on Environmental Quality (commission or TCEQ) files this response (Response) to the requests for a contested case hearing submitted by the persons listed herein regarding the above-referenced matter. The Texas Clean Air Act (TCAA), Texas Health & Safety Code (THSC) § 382.056(n) requires the commission to consider hearing requests in accordance with the procedures provided in Tex. Water Code (TWC) § 5.556.¹ This statute is implemented through the rules in 30 Texas Administrative Code (TAC) Chapter 55, Subchapter F.

A map showing the location of the site for the proposed facility is included with this response and has been provided to all persons on the attached mailing list. In addition, a current compliance history report, technical review summary, and a copy of the standard permit for concrete batch plants prepared by the Executive Director's staff have been filed with the TCEQ's Office of Chief Clerk for the commission's consideration. Finally, the Executive Director's Response to Public Comments (RTC), which was mailed by the chief clerk to all persons on the mailing list, is on file with the chief clerk for the commission's consideration.

I. Application Request and Background Information

Splendora Ready Mix, Inc., (Splendora or Applicant) has applied to the TCEQ for an Air Quality Standard Permit for Concrete Batch Plants under THSC § 382.05195, which would authorize the construction of a permanent concrete batch plant.² This permit will authorize Splendora to construct and operate a permanent concrete batch plant with the truck drop point and weigh hopper vented to a central dust collector, and with two silos

¹ Statutes cited in this response may be viewed online at www.capitol.state.tx.us/statutes/statutes.html. Relevant statutes are found primarily in the Texas Health and Safety Code and the Texas Water Code. The rules in the Texas Administrative Code may be viewed online at www.sos.state.tx.us/tac/index.shtml, or follow the "Rules, Policy & Legislation" link on the TCEQ website at www.tceq.state.tx.us.

² The contaminants authorized under this permit include road dust, aggregate, and cement. The contaminants emitted also have the potential to contain particles less than or equal to 10 microns in aerodynamic diameter (PM₁₀), and particles less than or equal to 2.5 microns in aerodynamic diameter (PM_{2.5}).

vented to silo-top dust collectors, all designed to limit the amount of excess dust emissions. In all, the site will operate 12 hours a day, 6 days a week, for 50 weeks a year, not to exceed 2,080 hours a year. Night-time operations at Splendora's plant are expressly prohibited. Plant throughput will be authorized at 300 cubic yards per hour, or less, with an annual throughput of 120,000 cubic yards per year. The facility is located at 26670 Midline Road in the city of Splendora, in Montgomery County, Texas.

Splendora's permit application was received December 14, 2009 and declared administratively complete on December 18. The Notice of Receipt of Application and Intent to Obtain an Air Quality Permit Registration (NORI) for this permit application was published on January 7, 2010 in the Houston Chronicle. An alternative language NORI was subsequently published January 10, 2010 in La Voz de Houston. Seven hearing requests were timely received by the TCEQ, one of which was a duplicate request by Mr. Wayne Hamilton. Because timely hearing requests were received, Splendora was required to publish a second notice of their application to the public. The second public notice, or the Notice of Application and Preliminary Decision for an Air Quality Standard Permit (NAPD), was published in both the Houston Chronicle and in an alternative language in La Voz de Houston on May 30, 2010. The public comment period for permit application 91552 ended on June 14, 2010. The RTC was filed September 15, 2010.

Seven hearing requests were filed by six individuals: Mr. James Carson, Ms. Nettie Hamilton, Mr. Wayne Hamilton, Mr. Charlie Lenox, Ms. Janie Lenox, and Ms. Regina Shaw. Mr. Hamilton is listed by TCEQ's Office of the Chief Clerk as two hearing requestors. Mr. Hamilton's hearing requests will be evaluated as a singular request by the Executive Director.

II. Applicable Law

The commission must assess the timeliness and form of the hearing requests, as discussed above. The form requirements are set forth in 30 TAC § 55.201(d):

(d) A hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requester's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requester believes he or she will

be adversely affected by the proposed facility or activity in a manner not common to members of the general public;

(3) request a contested case hearing;

(4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requester should, to the extent possible, specify any of the executive director's responses to comments that the requester disputes and the factual basis of the dispute and list any disputed issues of law or policy; and

(5) provide any other information specified in the public notice of application.

The next necessary determination is whether the requests were filed by "affected persons" as defined by TWC § 5.115, and implemented in commission rule 30 TAC § 55.203. Under 30 TAC § 55.203, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. Local governments with authority under state law over issues raised by the application receive affected person status under 30 TAC § 55.203(b).

In determining whether a person is affected, 30 TAC § 55.203(c) requires all factors be considered, including, but not limited to, the following:

(1) whether the interest claimed is one protected by the law under which the application will be considered;

(2) distance restrictions or other limitations imposed by law on the affected interest;

(3) whether a reasonable relationship exists between the interest claimed and the activity regulated;

(4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;

(5) likely impact of the regulated activity on use of the impacted natural resource by the person; and

(6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

In addition, this application is for a registration for the Standard Permit for Concrete Batch Plants. In accordance with TCAA, THSC § 382.058 (c), individuals are considered an "affected person," and may request a hearing on the construction of a concrete plant under a standard permit, if:

(c). . .those persons actually residing in a permanent residence within 440 yards of the proposed plant . . . request a hearing under Section 382.056 . . .³

³ TEXAS HEALTH & SAFETY CODE ANN. § 382.058 (Vernon 2001).

If the commission determines a hearing request is timely, fulfills the requirements for proper form, and the hearing requester is an affected person, the commission must then apply a three-part test to the issues raised in the matter to determine if any of the issues should be referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing. The three-part test in 30 TAC § 50.115(c) is as follows:

- (1) The issue must involve a disputed question of fact;
- (2) The issue must have been raised during the public comment period; and
- (3) The issue must be relevant and material to the decision on the application.

The law applicable to the facility proposed by Splendora may generally be summarized as follows. A person who owns or operates a facility or facilities that will emit air contaminants is required to obtain authorization from the commission prior to the construction and operation of the facility or facilities.⁴ Thus, the location and operation of the proposed facility requires authorization under the TCAA. Permit conditions of general applicability must be in rules adopted by the commission.⁵ Those rules are found in 30 TAC Chapter 116. In addition, a person is prohibited from emitting air contaminants or performing any activity that violates the TCAA or any commission rule or order, or that causes or contributes to air pollution.⁶ The relevant rules regarding air emissions are found in 30 TAC Chapters 101 and 111-118. In addition, the commission has the authority to establish and enforce permit conditions consistent with this chapter.⁷ The materials accompanying this response list and reference permit conditions and operational requirements and limitations applicable to this proposed facility.

For permit application 91552, the Executive Director's staff referred to the pertinent provisions of TCAA, THSC § 382.058, Notice of and Hearing on Construction of Concrete Plant Under Permit by Rule, Standard Permit, or Exemption, in effect at the time the permit application was declared administratively complete December 18, 2009.

III. Evaluation and Analysis of the Requests

A. *Were the requests for a contested case hearing in this matter timely and in proper form?*

The following persons submitted a timely hearing request and provided an address that is beyond one-quarter mile from the facility: Mr. James Carson, Ms. Nettie Hamilton, Mr. Wayne Hamilton, Mr. Charlie F. Lenox, Sr., Ms. Janie Lenox, and Ms. Regina Shaw.

⁴ TEXAS HEALTH & SAFETY CODE ANN. § 382.0518 (Vernon 2001).

⁵ TEXAS HEALTH & SAFETY CODE ANN. § 382.0513 (Vernon 1995).

⁶ TEXAS HEALTH & SAFETY CODE ANN. § 382.085 (a) and (b) (Vernon 1997).

⁷ TEXAS HEALTH & SAFETY CODE ANN. § 382.0513 (Vernon 1995).

The hearing requests were submitted during the public comment period or during the period for requesting a contested case hearing after the filing of the RTC; therefore, all hearing requests were received in a timely manner. As for the proper form, all the hearing requestors provided information that is in compliance with the applicable law, 30 TAC § 55.201(d). Because the requestors provided information that is in compliance with 30 TAC § 55.201(d), the Executive Director can determine whether it is likely that these requestors will be impacted differently than any other member of the general public or if there is a likely impact of the regulated activity on these persons' interests. This will be discussed in detail below.

The Executive Director addressed all public comments in this matter by providing responses in the RTC. The cover letter from the Office of the Chief Clerk attached to the RTC states that requesters should, to the extent possible, specify any of the Executive Directors' responses in the RTC that the requesters dispute and the factual basis of the dispute, and list any disputed issues of law or policy.⁸ As of the date of this filing, none of the hearing requestors have filed a response to the RTC which reiterated issues raised during the comment period. In the absence of a response from any of the other hearing requestors or their representatives within the thirty-day period after the RTC was mailed, the Executive Director cannot determine or speculate whether the hearing requestors continue to dispute issues of fact, or whether there are any outstanding issues of law or policy. The Executive Director nevertheless has included all of the issues raised by hearing requestors and commenters regarding this application as listed below.

B. Are those who requested a contested case hearing in this matter affected persons?

The threshold test of affected person status is whether the requestor has a personal justiciable interest affected by the application and whether this interest is different from that of the general public.⁹ The definition of an affected person for Standard Permits for Concrete Batch Plants is limited to only those persons who reside in a permanent residence within 440 yards of the proposed plant.¹⁰ In determining whether a person is affected, one of the factors of 30 TAC § 55.203(c) requires the Executive Director to consider distance restrictions or other limitations imposed by law on the affected interest.¹¹ All of the hearing requestors who submitted requests on application 91552 fail to meet this distance requirement as none of them permanently reside within 440 yards of the proposed plant, as indicated on the enclosed map.¹² The requestors' inability to

⁸ See 30 TAC § 55.201(d)(4) (2009)(Tex. Comm'n on Env. Quality, Requests for Reconsideration or Contested Case Hearing).

⁹ *United Copper Indus. v. Joe Grissom*, 17 S.W.3d 797 (Tex. App.—Austin 2000, pet. abated).

¹⁰ TEXAS HEALTH & SAFETY CODE ANN. 382.058(c) (Vernon 2001).

¹¹ 30 TAC § 55.203(c)(2) (1999) (Tex. Comm'n on Env. Quality, Determination of an Affected Person).

¹² See, attached map and legend listing the locations of the hearing requestors. TCEQ utilizes internal mapping software (GIS maps) in conjunction with MapQuest, or Google Earth to show any homes within this purported distance from either the plant's boundary lines or the facility. The Executive Director acknowledges there are homes within the statutory distance required in the rule; however, none of the requestors who made timely hearing

meet the distance requirement of THSC § 382.058(c) bars by operation of law their affected person status. In addition, because the Executive Director determined that the hearing requestors for application 91552 reside greater than 440 yards from the proposed facility, they are also not likely to be impacted differently than any other member of the general public; accordingly, the requestors have failed to state any "personal justiciable interest" under 30 TAC § 55.203. Without a "personal justiciable interest," these hearing requestors are not "affected persons" as defined by 30 TAC § 55.203, and do not meet the requirements of a person able to request a contested case hearing according to 30 TAC § 55.201.

C. Which Issues in this Matter should be Referred to SOAH for a Hearing?

If the commission determines any of the hearing requests in this matter are timely and in proper form, and some or all of the hearing requestors are affected persons, the commission must apply the three-part test discussed in Section II to the issues raised in this matter to determine if any of the issues should be referred to SOAH for a contested case hearing. Based on the analysis previously offered, none of the persons requesting a hearing on this permit are affected persons as a matter of law; therefore, none of the hearing requests meet the prerequisites necessary for the commission to consider issues for referral to SOAH.¹³

requests permanently reside in any of those homes.

¹³ TEXAS HEALTH & SAFETY CODE ANN. § 382.058(c) (Vernon 2001).

IV. Conclusion and Recommendation

The Executive Director respectfully recommends the Commission:

1. Deny the hearing requests for permit no. 91552 as a matter of law pursuant to 30 TAC § 55.201(d)(4), and;
2. Approve the issuance of Applicant's permit No. 91552.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Robert Martinez, Division Director
Environmental Law Division



Alexis Lorick, Staff Attorney
Environmental Law Division
Bar No. 24070174

Representing the Executive Director of the
Texas Commission on Environmental Quality

Splendor Ready Mix, Inc. Location Aerial Determination of Affected Person Status Map Requested by TCEQ Office of Legal Services for Commissioners' Agenda January 26, 2011



Texas Commission on Environmental Quality
GIS Team (Mail Code 197)
P.O. Box 13087
Austin, Texas 78711-3087
December 20, 2010

0 0.1 0.2 Miles

Projection: Texas Statewide Mapping System
(TSM)
Scale 1:12,085

- Legend**
- Facility
 - Property Boundary
 - Requestor's Property

Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the applicant and the requestor information from the requestor. The vector data are U.S. Census Bureau 1992 TIGER/Line Data (1:100,000). The background of this map is a one-half meter photograph from the 2008 Texas Orthoregistry Project.

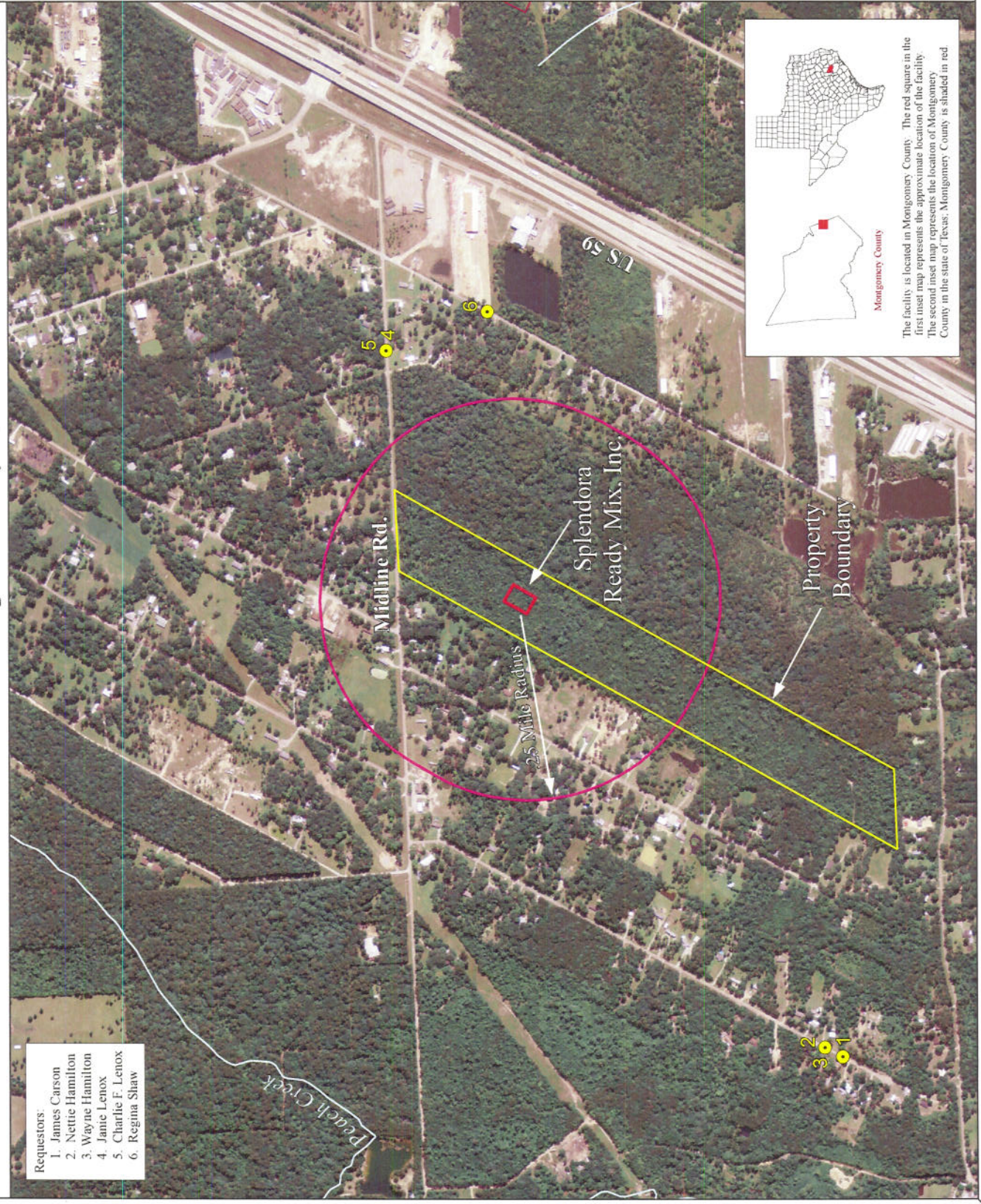
This map depicts the following:

- (1) The approximate location of the facility. This is labeled "Splendor Ready Mix, Inc."
- (2) Circle and arrow depicting 1/4 mile radius. This is labeled "25-Mile Radius"
- (3) Approximate property boundary. This is labeled "Property Boundary"
- (4) Requestors locations. These are labeled with an id number.



This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This map was not generated by a licensed surveyor, and is intended for illustrative purposes only. No claims are made to the accuracy or completeness of the data or to its suitability for a particular use. For more information concerning this map, contact the Information Resource Division at (512) 239-0800.

UTM/Zone 16N/UTM/Zone 16N



- Requestors:**
1. James Carson
 2. Nettie Hamilton
 3. Wayne Hamilton
 4. Jamie Lenox
 5. Charlie F. Lenox
 6. Regina Shaw

CERTIFICATE OF SERVICE

On the 30th day of December, 2010, I certify that a true and correct copy of the foregoing instrument has been served via hand delivery, facsimile, electronic mail, first class mail, interagency mail, and/or overnight mail on the undersigned



Alexis Lorick
Staff Attorney, Environmental Law Division

SERVICE LIST

FOR THE APPLICANT:

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Janie Lenox
26908 Midline Rd.
Cleveland TX 77328-7363

Regina Shaw
12258 Cole Dr.
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**PUBLIC OFFICIALS – INTERESTED
PERSON(S):**

The Honorable Tommy Williams
Texas State Senate – District 4
P.O. Box 12068 Room GE.7
Austin, Texas 78711-2068

INTERESTED PERSONS:

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Emma Coody
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Jesse & Misty Coody
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